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No. ~~1023~~ 163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE AS ADMINISTRATOR OF THE ESTATE OF WALTER D. SAYLE, Deceased,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF MARTIN COUNTY, FLORIDA. DISTRICT COURT OF APPEAL OF FLORIDA, AND SUPREME COURT OF FLORIDA.

JURISDICTIONAL STATEMENT.

Attorney for Appellant.

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APPEAL FROM THE CIRCUIT COURT OF MARTIN COUNTY, FLORIDA. DISTRICT COURT OF APPEAL OF FLORIDA, AND SUPREME COURT OF FLORIDA.

NOTICE OF APPEAL.

John A. Dunscombe, the appellant, filed this his notice of appeal in the United States Supreme Court from the final judgments of the Circuit Court of Martin County, Florida, and the final judgments of the District Court of Appeal of Florida quashing his appeal and the final judgments of the Supreme Court of Florida denying his petition for certiorari and its refusal to reconsider said judgment entered upon April 26th, 1960, under the rule stated in *Western Union Tel.* v. *Hughes*, 203 U.S. 505, 27 S. Ct. 162, together with his statement of why the United States Supreme Court has jurisdiction to review said judgments.

Attorney for Appellant.

STATEMENT OF JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL FROM FINAL JUDGMENTS OF THE COURTS OF THE STATE OF FLORIDA.

Pursuant to Rule 13-2 of the Supreme Court of the United States the appellant files this his statement of the basis upon which he claims that the Supreme Court of the United States has jurisdiction on appeal to reverse the final judgments of the Florida State Courts herein complained about.

That this appeal is taken under Title 28, Sec. 1257, U.S. Code, to reverse the judgments of the Florida State Courts herein complained about and said appeal was filed in Florida Supreme Court on April 26th, 1960, and within 90 days after the petition for rehearing was denied as provided by Rule 11-1 and jurisdiction of this court is invoked on the ground that petitioner has in violation of Article One, Section 10 and the Fifth and Fourteenth Amendments to the United States Constitution, been deprived of his property without compensation and without due process of law.

That the following Florida statutes and Rules of Court have been disregarded by the Florida courts in reaching the decisions herein complained about.

A. Sec. 62.37, Florida Statutes, provides for filing a creditor's bill when plaintiff has recovered a judgment at law, had execution issued and a *nulla bona* return thereon or filed a suit at law for a judgment and in which case no final decree can be rendered until the judgment at law has been obtained.

B. Sec. 173 of Florida Statutes provides for a municipality foreclosing its delinquent tax certificates in an *in rem* proceeding.

C. Sec. 192.21 makes taxes lawfully assessed a first lien on the land assessed until paid or redeemed.

D. Sec. 702.02, Florida Statutes, authorizes the Court to appoint the Clerk of the Circuit Court to advertise and sell foreclosed property, issue a certificate of sale to the purchaser at the time of sale and issue a certificate of title ten days thereafter if no objections to the sale have been filed.

E. Sec. 184.16, Florida Statutes, provides that when a tax certificate is two years old the holder thereof may apply for a tax deed and unless the certificates are redeemed before sale the holder is entitled to a tax deed.

F. Sec. 194.43 provides that the Clerk of the Circuit Court shall make deeds to land sold by a city or town for taxes.

G. Article 9, Sec. 8 of the Florida Constitution and Sec. 196.01 of Florida Statutes provides for injunctions against tax sales and Sec. 196.05 requires the plaintiff in such an action to first pay the tax collector the full amount of such taxes that could be lawfully assessed.

In the instant case the final decree of foreclosure was entered that determined the amount of taxes that could be lawfully assessed against the property in suit.

H. Chapter 321.80, Special Acts of the 1953 Florida Legislature, validated and confirmed the sale of the land and assignment of the tax certificates and the final decree based thereon by the City of Stuart to the appellant.

I. Chapter 16692, Special Acts of 1933, is the Charter of the City of Stuart and Sec. 105 makes the taxes assessed by it a lien superior to all other liens.

Sec. 108 of said charter makes the City tax certificates assignable.

Sec. 7-b of said Charter authorizes the City of Stuart to sell its real and personal property as any natural person could do and Sec. 7-g gives the City any power that any other Florida municipality can exercise.

J. Sections 4, 12 and 17 of the Florida Declaration of Rights, Art. 5, Sec. 5 of amended and Art 9, Sec 8 of the Florida Constitution provides that the court of said State shall always be open to hear complaints, justice shall not be delayed or denied and private property shall not be taken without due process of law or without compensation.

K. Sec. 3.19 of Florida Rules of Procedure forbids injunctions to issue without notice or bond.

L. Art. 1, Sec. 10 of the United States Constitution forbids a State to pass any law impairing a contract.

The Judgments herein sought to be reviewed are as follows:

1. The final decree of foreclosure by the *City of Stuart* v. *Certain Lands*, Chancery No. 2352, on Block 12, Section Three of St. Lucie Estates less the west 175 feet thereof.

2. The final decree in the alleged creditor's suit cancelling the tax certificates reduced to final decree in *City of Stuart* v. *Certain Lands* and holding that the appellant was a *bona fide* purchaser for value of the tax certificates ordered cancelled.

3. The final decree in the *City of Stuart* v. *Certain Lands*, Chancery No. 2352, where appellant was substituted to enforce the final decree assigned by the City of Stuart to appellant.

4. The Order of the Chancery Court holding that the appellant was not in contempt of court for disregarding the void order of Cancellation entered in the alleged creditor's suit. Chancery No. 2352.

5. The order of the District Court of Appeal quashing the appeal of the appellant and denying his petition for rehearing.

6. The refusal of the Florida Supreme Court to grant certiorari, and its denial of the petition to reconsider and grant a rehearing.

HISTORY OF THE CASE.

The State of Florida under Sec. 173, Florida Statutes, authorized municipalities to bring suits *in rem* to foreclose their municipal tax claims and the City of Stuart proceeded under that act and sued to foreclose their alleged delinquent taxes against Block 12, Sec. Three of St. Lucie Estates, less the west 175 feet thereof and obtained a final decree. The City did not enforce that decree but sold and assigned to the appellant for a valuable consideration that part of the final decree as it affected the above described land and which assignment carried with it the tax certificates upon which it was based, and thereafter the Florida Legislature under Chapter 32180, Special Acts of 1953, validated and confirmed said assignment and sale by the City of Stuart.

Thereafter the appellee, although he had no judgment at law against any of the defendants or had filed

no suit to obtain one brought his alleged creditor's bill under Sec. 172 and asked the tax certificates reduced to final decree in City tax foreclosure suit and sold and assigned to the appellant be cancelled or made a collateral attack thereon. As the City received no notice of the hearing the appellee dismissed its claim against the City but the trial court found that the appellant was a *bona fide* purchaser of said tax certificates but then went further and sustained the collateral attack thereon and ordered the tax certificates that had been reduced to final decree in the suit of the City cancelled.

As the appellee had foreclosed a mortgage on this claimed property and which was inferior to the lien of the City taxes he represented to the Court in that action that he took subject to these very taxes and therefore had his sale confirmed for a low figure and was therefore estopped to contest the enforcement thereof and his only remedy was to redeem the taxes before the sale to enforce them.

That after the assignment of the part of the final decree and the tax certificates on which they were based by the City to appellant he moved under Rule 1.19 of Florida Rules of Procedure to be substituted in the place of the City to enforce the assigned final decree on the property in question and the court ordered such substitution, subject to the order of Judge Frank Smith cancelling the tax certificates that had been reduced to final decree and assigned to appellant and ordered the Clerk to advertise and sell the land under Sec. 702.02 to satisfy the assigned final decree.

The Clerk then advertised and sold the land to the appellant and executed and delivered her certificate of sale. No objections were filed to or against said sale within

the 10 day period and when the appellant applied for his certificate of title the Clerk informed him that she had been orally enjoined from issuing the certificate of title although no objections had been filed to the sale.

As a result the appellant was deprived of the benefit of his contract with the City to enforce the final decree and regardless of the fact he had purchased the assignment of the final decree and the court had found that appellant was a purchaser thereof for value.

The appellee then cited the appellant for contempt of court for seeking to enforce the final decree and asked the enforcement be vacated but the court found he was not in contempt but vacated the order of substitution and the sale proceedings.

As it appeared these final judgments violated the Federal and State Constitutional rights of the appellant. He took his appeal to the District Court of Appeal, and assigned such errors but that court regardless of the Rule and before the record was before it granted the motion to quash the appeal.

As those judgments appeared to be void and no appeal lay from a void judgment nor would its affirmance make it valid he asked the Florida Supreme Court for a writ of certiorari to review these proceedings and make such orders that would entitle the petitioner, the record showed he was entitled to receive, but the Supreme Court denied his petition and his petition for rehearing so he took his appeal to this court to review the judgments herein complained about.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Martin County Circuit Court have any jurisdiction of the subject matter of a creditor's bill to cancel tax certificates sold and assigned to the appellant when the complaint failed to allege that that plaintiff had recovered a judgment at law against him and had a *nulla bona* return on the execution or had commenced a suit at law and recovered a judgment against the defendant before the entry of the final decree?

> The Court found that appellant was a bona fide purchaser of the tax certificates for value but then ordered them cancelled.

2. If the City of Stuart had reduced its tax claims on this land to a final decree of foreclosure on this land and before enforcement thereof had for a valuable consideration sold and assigned said final decree to the appellant, could the trial court lawfully cancel such foreclosed tax certificates based on a collateral attack thereon and constitutionally deprive the appellant of his property rights therein and his right to its enforcement?

> The trial court sustained the collateral attack on the final decree of foreclosure and cancelled the tax certificates it found the appellant was the bona fide purchaser thereof.

3. That under the laws of Florida, taxes are liens until paid and the record shows the liability of this land for the City taxes was determined in the tax foreclosure suit for the amount of unpaid taxes and that part of the final decree was assigned to the appellant for a valuable consideration while the record shows said taxes had not been paid or redeemed before the sale and yet the appellant was deprived of his contract right with the City

of Stuart that unless said taxes were paid or redeemed before the sale appellant would be entitled to a deed or a certificate of title thereto.

4. That under the laws of Florida one who purchases a tax certificate or a final decree based thereon has a contract with the one who issued the tax certificate that unless such taxes are paid, the holder thereof can apply for a tax deed and if such taxes are not paid or redeemed before the sale the holder thereof is entitled to a tax deed or certificate of title. That such a *bona fide* purchaser cannot be deprived of his property in the manner herein complained about by a law that impairs his contract or by judicial construction of the law.

5. That as the 1953 Florida Legislature had validated and confirmed the sale and assignment of said tax certificates and final decree to the appellant the trial court had no jurisdiction to cancel said tax certificates and so deprive the appellant of his property by such means.

6. That the record shows that the appellee purchased the property he claims at his own sale, made a nominal bid therefor on the ground he purchased subject to these very taxes and would therefore be estopped to contest their enforcement on any ground.

7. That the trial court, in its order of substitution recognized the right of the appellant to enforce the assigned final decree and the tax certificates on which it was based and directed the Clerk to advertise and sell the delinquent tax lands, could not then orally enjoin the Clerk from doing her plain statutory duty and delivering the certificate of title when no objections had been filed to such sale and Rule 3.9 of Florida Rules of Procedure forbid oral injunctions and the plain remedy was under Sec. 702.02 to file objections to said sale with the Clerk

within ten days after said sale, and equity had no jurisdiction to enter or make any such oral injunction when the appellee had a plain and clear statutory remedy by filing objections, if any, within the ten day period.

8. That the appellant could not be in contempt of court for disregard of the void order attempting to cancel the tax certificates that had been merged in the final foreclosure decree and that court had found the appellant was a purchaser for value, and asking the Clerk to advertise and sell said lands to enforce the same as in the order of substitution provided.

9. That if the trial court found that the appellant was not in contempt of court for disregard of the void order cancelling the tax certificates that had been reduced to a final decree and he was the owner thereof by assignment then it had no jurisdiction to vacate its order of substitution and all proceedings held thereunder and so deprive the appellant of his property and the right to enforce said final decree of tax foreclosure.

10. That the record of the proceedings herein complained about clearly shows that the appellant has been deprived of his property and the right to enforce it in violation of his State and Federal Constitutional rights and without due process of law by the Circuit Court for Martin County, Florida, the District Court of Appeal and the Florida Supreme Court and in direct conflict of the laws of Florida was decided by the Florida Supreme Court when he purchased said tax certificates and that part of the final decree upon which it was based and in violation of his State Constitutional rights under Sec. 4-12-17 of the Florida Declaration of Rights and under Art. I, Sec. 10 and the Fifth and Fourteenth Amendments to the Federal Constitution.

ARGUMENT.

FIRST AND SECOND QUESTIONS.

Did the Martin County Circuit Court have any jurisdiction of the subject matter of an alleged creditor's bill under Sec. 67.32, Florida Statutes, when the bill did not allege that the appellee had recovered a judgment at law against the appellant and had an execution issued and a nulla bona return thereon or had commenced a suit at law and recovered a judgment against the appellant before the order of cancellation?

The final decree does not so state, but on the contrary finds that the appellant was a *bona fide* purchaser of said tax certificates and then orders the tax certificates that had been reduced to a final judgment cancelled of record. Such order clearly shows that what in fact the appellee was doing was making a collateral attack on the foreclosed tax certificates and which were superior to his claim and the court had no jurisdiction to sustain such a collateral attack or order cancelled the tax certificates that it found the appellant was a *bona fide* purchaser thereof. That the only court that could have reversed the final decree of foreclosure was the Florida Supreme Court and as no appeal had ever been taken from that final decree it was *res adjudicata* and beyond attack.

The Florida Supreme Court cases construing Sec. 67.32 and collateral attacks on final judgments are cited below.

8 Florida Jur. 543, citing

Armour Fertilizer Works v. *First Nat'l Bank*, 100 So. 362

B. L. E. Realty Corp. v. Mary Williams Co., 134 So. 47.

Hillsboro County v. Dickenson, 169 So. 734.

Cowdery v. Herring, 144 So. 348.

As now applied a creditor's suit is a proceeding in equity brought by a creditor who has secured a judgment for the purpose of reaching property of the debtor which cannot be reached by ordinary legal process.

As a matter of fact the action was brought as a declaratory judgment action and so used to make a collateral attack on the valid final decree in the City tax foreclosure suit.

The Florida declaratory judgment act was adopted from the Federal Act and is in the nature of an extraordinary remedy and cannot be used if there is any other statutory remedy. 19 Fla. Jur. 456, cites

De Marginy v. De Marginy, 43 So.2d 442:

> "The declaratory judgment statute is not a device by which to make a collateral attack upon final judgments and decrees."

Smith v. Irvine, 68 So.2d 567:

> "An action in equity to establish a lien on property of the debtor, alleging the defendant will have insufficient assets to satisfy a judgment at law when and if a judgment is obtained, is in the nature of a creditor's suit."

The court will appreciate it that while it was not charged that the appellant owed the appellee any money or that a judgment at law had been obtained or a suit at law was pending against the appellant by the appellee, filing a complaint for a declaratory judgment and making a collateral attack on the final tax foreclosure decree was

in the nature of creditor's suit and therefore the court had no jurisdiction of the subject matter of the action but as the court found there was no basis for any such attack and the appellant was a *bona fide* purchaser of the tax certificates, it could hardly then order them cancelled as they were a lien until paid and had been foreclosed by the City and reduced to final decree long prior to the attack on them. The appellant did not owe the estate of the appellee any money nor had any judgment at law been obtained against him nor was any suit at law pending against the appellant. Such a judgment is so repugnant as to be void as to the order of cancellation. The court will appreciate the fact that the City reduced its tax claims to a judgment and they continued as liens until paid and the City assigned that part of the final judgment to the appellant with the right to enforce it in its name.

19 Fla. Jur. 95, citing *Standard Accident Ins. Co.* v. *Beer*, 168 So. 18:

> "The assignment of a decree necessarily carries with it the cause of action on which it is based, together with all the beneficial interests of the assignor and the right to enforce it."

THIRD QUESTION.

If the City of Stuart had reduced its tax claims to judgment and for a valuable consideration assigned this judgment to appellant could the trial court lawfully cancel the tax certificates upon which the judgment was based on a collateral attack on said final decree and constitutionally deprive the appellant of his property right therein and the right to enforcement?

What in fact took place was the court taking the property of the appellant and giving it to the appellee for

no consideration when the appellee was estopped to ask the tax certificates be cancelled on any grounds when he had already deducted the amount thereof when he purchased the land and took subject thereto.

6 Fla. Jur. 544, *Heller* v. *Abess*, 184 So. 122:

> "The due process clauses of the State and Federal Constitutions are a protection against deprivation of property without due process of law."

Sec. 12 of the Florida Declaration of Rights and the Fifth and Fourteenth Amendments to the Federal Constitution so provides which the Fourteenth Amendment forbids any state to take or deprive any person of his property without due process of law. As the State acts through its courts it could not constitutionally by such a proceeding cancel the tax certificates that had been reduced to a final judgment.

12 Am. Jur. 343; *Louisiana ex rel. Folsom* v. *New Orleans*, 109 U.S. 285, 3 S. Ct. 211:

> "Rights acquired by a judgment are property rights that cannot be taken without due process of law."

The appellee was estopped to attack the tax certificates or the decree based thereon upon any grounds and his only remedy was to pay and redeem the taxes before the land was sold.

FOURTH QUESTION.

If under the laws of Florida such taxes are a prior lien until paid and the liability for this land was determined in the City of Stuart tax foreclosure suit for the unpaid taxes and then assigned to appellant for valuable consideration and the record shows that said taxes had never been redeemed or paid before the Clerk sold the land for the unpaid taxes of the City of Stuart.

Based upon the decision of this Court in *Leigh* v. *Green*, 193 U.S. 79, 74 S. Ct. 390, the Florida Legislature enacted Sec. 173.02 that provided for *in rem* proceedings to enforce its delinquent taxes, and the Florida Supreme Court held such method was valid in *Horne* v. *City of Ocala*, 196 So. 441, appeal from that decision dismissed 311 U.S. 608, 61 S. Ct. 28.

51 Am. Jur. 830, Note 13, citing *State* v. *Evans*, 6 P.2d 161, 84 A.L.R. 766:

> "Payment alone discharges the obligation for taxes and until payment is made the state may proceed by all proper means to collect the tax."

Sec. 173.12 provides that any time prior to the sale any interested person could pay and redeem the taxes and their part of the attorney's fees and suit costs.

But the record here shows that the taxes sought to be enforced were not paid before the sale nor were any objections filed to said sale when the purchaser applied for his certificate of title under Sec. 702.02.

Under Sec. 192.21 taxes lawfully assessed are a prior lien until paid. The tax foreclosure suit determined the amount of municipal taxes this land was liable for, nor was that final decree subject to collateral attack.

51 A.J. 900, Note 2, *Leigh* v. *Green*, *infra*:

"Such a judgment is not subject to collateral attack."

FIFTH QUESTION.

Under the laws of Florida the purchaser of a tax certificate has a contract with the taxing body that unless the taxes are paid the holder of the tax certificate can apply for a tax deed or foreclose the certificate if the certificate is two years old and unless the taxes are paid before the sale such applicant is entitled to a deed to the land.

6 Fla. Jur. 508, citing *Anders* v. *Nicholson*, 150 So. 639:

"The constitutional provision against the impairment of contracts applies to those of municipalities and any thing that impairs its remedy of enforcement violates such right. And this applies to judicial construction of the law as it was when the contract was made."

State v. *Draughton*, 173 So. 353, 111 A.L.R. 234:

"A 'tax certificate' is a contract between the State and the purchaser thereof, and the rights of the holder of the tax certificate are to be determined by laws in force when the tax certificate was acquired."

Under the laws of Florida the purchaser of the tax certificate had the right to advertise and sell the land to enforce the final decree. *Horne* v. *City of Ocala*, *supra*.

Thompson v. *Perrine*, 103 U.S. 806; *Douglass* v. *Pike County*, 101 U.S. 677, and cases cited therein:

"After the statute has been settled by judicial construction the construction becomes as far as the

contract rights acquired under it are concerned as much a part of the statute as the text itself and a change of decisions is the same in effect as the amendment of the law by means of legislative enactment."

In other words the State through its courts have amended the law that was in effect when the contract was obtained and impaired the remedy of its enforcement.

In this case the claim is that that cancellation of the tax certificates on which the final decree was based took the appellant's property without due process of law and further impaired his remedy to enforce it, while the oral injunction in forbidding the Clerk not to issue and deliver the certificate of title also impaired the contract.

SIXTH QUESTION.

That the 1953 Florida Legislature had validated and confirmed the sale of the final decree and tax certificates on which it was based to appellant and therefore the trial court was without jurisdiction to order said tax certificates to be cancelled of record and so deprive the appellant of his property by such means.

Bolles v. *Brimfield*, 120 U.S. 759:

"The Legislature in the absence of constitutional restrictions can by subsequent ratification make legal that which was originally without legal sanction but which it might have in the first place authorized."

Sebring v. *Harder Hall*, 9 So.2d 350:

"The validation act put the right to assign the final decree in repose."

Hendry v. *Kellow*, 114 So. 235:

"The legislature may validate irregular and illegal acts of a municipality."

Chapter 321.80, Special Acts of 1953 Florida Legislature, validated and confirmed this sale and assignment regardless of the law, under Chapter 166.92, Special Acts of 1933; the City of Stuart charter gave the city the right to sell and assign its tax certificates and personal property and hence this assignment was not subject to attack on any ground.

SEVENTH QUESTION.

That the record shows that the appellee purchased this land at his own sale and made a nominal bid therefor on the grounds he took subject to the prior lien of these taxes and therefore would be estopped to contest the sale on any grounds.

51 A.J. 884, Note 15:

> "A tax lien having attached to the land is not divested by the sale of the land under mortgage foreclosure or any other proceedings. Such liens follow the property into the custody of executors, administrators, etc."

Osterburg v. *Union Trust*, 93 U.S. 424; *Key West Wharf* v. *Porter*, 58 So. 599, 1914 Anno. Case Atl. 173:

> "One who purchases property subject to existing liens and deducts the amount thereof from the purchase price is estopped to defend against the enforcement thereof *on any grounds*."

Cape Sable v. *McClung*, 74 So.2d 883; *Bloxham* v. *Consumers Power*, 18 So. 444, 118 A.L.R. 924:

> "One who purchases at his own judicial sale takes the property subject to any liens and incumberances of record."

In this case the appellee purchased at his own sale and deducted the amount of the City tax liens from the

purchase price and he was therefore estopped to contest the enforcement of the tax claim on any grounds. He could not lawfully attack the lien he had once deducted and his only remedy was to pay and redeem the taxes before the land was sold to enforce the final decree of foreclosure. Therefore the trial court erred in granting any relief to the appellee.

EIGHTH QUESTION.

That the trial court in its order of substitution recognized the right of the appellant to enforce that part of the final decree that was assigned to him and the tax certificates on which it was based, and the court adopted Sec. 702 as the means of enforcement and directed the Clerk to advertise and sell the land and when no objections to said sale had been filed, orally enjoin the Clerk from performing her statutory duties as Rule 3.9 of the Florida Rules of Procedure forbid oral applications for injunctions and if the appellee had any right to object to the sale at all, in view of the fact he had already deducted the amount of the tax liens from his purchase price he had a plain statutory remedy at law by filing objections to the sale within the ten day period.

The court in its order of substitution ordered the Clerk to advertise and sell this land to enforce that part of the assigned decree and subject to the void order of cancellation of the tax certificates that had been reduced to final decree. The Clerk proceeded to obey this order, advertised and sold the land and issued the certificate of sale, and when the ten day period had expired and no objections to the sale were filed the purchaser applied for his certificate of title. But the Clerk then stated that she had been enjoined verbally by the Judge from issuing such title certificate regardless of Rule 3.9 that forbids oral applications for

injunctions without notice, and so again the appellant was deprived of his property or the right to enforce his contract without due process of law.

17 Fla. Jur. 418; *Re Mendenhall*, 17 So. 561:

> "Equity will not assume jurisdiction to forbid public officers from performing their statutory duties required by law or performing lawful acts not in excess of their authority."

17 Fla. Jur. 385; *Johnson* v. *Keller*, 27 So.2d 345:

> "Injunction will not lie where there is a choice of ordinary process of law and injunction as the process of law is sufficient to give full relief."

The appellee's remedy was to file objections to the sale within the ten day period, if any he had, or pay the taxes before the sale.

NINTH QUESTION.

That the appellant could not be in contempt of court for disregarding the void order of cancellation of tax certificates that had been reduced to final decree and having the Clerk advertise and sell the land as ordered by the court.

In the order on the citation for contempt the court found that the appellant was not in contempt in having the land sold to enforce the final decree, as the court had ordered it sold and what the court meant by the inclusion in this order of substitution that it was subject to the order of Chancery No. 2352 when that order found that appellant was the purchaser of the claim for a valuable consideration and certainly the order cancelling the tax certificates on the collateral attack was void as they had been reduced to a final decree and the sale validated.

There is a lengthy note in 12 A.L.R.2d 1075, and cites among other cases *State* v. *Petteway*, 171 So. 666:

> "Where it has held there could be no contempt of a void order."

In other words such an order creates no rights, stops no one and if it in any way had, no order of substitution should have been entered. The court in Chancery No. 2352 could not well find that the appellant was the lawful purchaser of the final decree and the tax certificates upon which it was based, and in the same order, order such property cancelled. The City had foreclosed its tax liens and obtained the final decree and that decree determined the amount of the lawful tax claims the City was entitled to enforce. That the trial court on the contempt citation found that the appellant was not in contempt for disregard of the void order of cancellation but then it proceeds to vacate its order of substitution and all proceedings based thereon regardless of the fact the remedy of the appellee, if any, was to file his objections to the sale within the ten day period and not make a collateral attack in this manner and as a result the appellant has been deprived of his property and the right to enforce it by such means regardless of the fact the court has found he is a *bona fide* purchaser for value. These orders are so repugnant as on their face to be void as to the matters complained about, and no litigant can follow such conflicting decisions.

TENTH QUESTION.

That in the record of these proceedings the appellant has been deprived of his property without due process of law and his right to enforce his claim or contract has been impaired by court decree regardless of the fact when he purchased the final foreclosure decree the Florida Supreme Court had held in Horne v. City of Ocala, supra, that such proceedings were valid and such decrees could be enforced and which was sustained by this court on the appeal.

That no person can deal with Florida municipalities if they are to be deprived of their property without due process of law and rights to property and their remedy to enforce their contracts are to be impaired or destroyed by the methods pursued in this action. In this case when the appellee purchased at his own sale and deducted the amount of the City tax lien from the purchase price he had no other remedy than to pay the taxes before the sale, he could not bring a suit to have them cancelled nor could the trial court grant any such relief and in fact allow the appellee to avoid paying the taxes he had deducted from the amount of his bid; he could not have filed any valid objections to the sale as he had none and that was his plain statutory remedy. The court had no jurisdiction to enter the oral injunction without notice and forbid the Clerk to perform her statutory duty, and by such means deprive the appellant of his certificate of title to the property that had been sold to satisfy the tax foreclosure claim. That in the record of these proceedings it clearly appears that he has been deprived of the property the court found he was a *bona fide* purchaser for value of in violation of his federal and state constitutional rights and the cause should be reversed and re-

manded to the Circuit Court of Martin County with instructions to the Clerk to execute and deliver to the appellant his certificate of title to the land he purchased at the foreclosure sale.

Respectfully,

Attorney for Appellant.

APPENDIX.

As the Florida Supreme Court has construed all the Florida statutes cited with the exception of the parts of the City Charter, Chapter 16692, Special Acts of 1933, the parts of that act cited are stated below:

Sec. 7-D authorizes the City of Stuart to acquire, sell and convey real and personal property for the best interest of the City.

Sec. 7-G as amended by Chapter 23, 544 Laws of 1945:

> The City shall have and may exercise all other powers which under the constitution and laws of Florida it will be competent for this charter to specifically enumerate.

Sec. 108:

> Authorizes the City to issue tax certificates for delinquent taxes and such tax certificates shall be subject to assignment or transfer.

In view of the fact the 1953 legislature validated the sale and assignment of the final decree and tax certificates based thereon under Chapter 32180, Special Acts of 1933, it is hardly necessary that such power be especially set out in its charter. However the Florida Supreme Court has consistently held that a municipality can see and assign its tax certificates.

Sec. 194.43 authorizes the Clerk of the Circuit Court to issue tax deeds for lands sold for nonpayment of municipal taxes.

Hyland v. *Rodney*, 195 So. 574:

> "Equity will not enjoin issuance of tax deed to holder of tax certificate until landowner offers to pay, repay or reimburse such holder to extent of amount paid by him to clear land of tax liens as well as the amount paid for certificate with interest thereon."

Under Sec. 173, the *in rem* proceedings which the City adopted in this case the landowner must not only pay the taxes delinquent with interest thereon but his part of the court costs and attorney's fees.

No one paid any delinquent taxes before the land was sold and no injunction would be issued or could be lawfully issued to restrain the sale even if such an action had been filed and notice of the application given. Florida Rules of Ethics forbids such practice.

Rule 3.9, Florida Rules of Procedure:

> In all cases of application for injunction, the judge to whom presented, before granting the same, shall be satisfied sufficient notice of the application shall have been given to the party sought to be enjoined and of the time and place where the motion is to be made, and no order for such injunction shall be granted without such notice unless it is manifest to the judge from the sworn allegations of the complaint that injury apprehended will be done if an immediate remedy is not afforded whereupon he may grant instanter an order restraining the party complained of until the hearing or further order of court.

But no sworn complaint was filed and no notice given the appellant of any such application and there is no provision for any such procedure.

As stated in *Hyland* v. *Rodney*, 195 So. 574, injunction will not issue to enjoin the issuance of a tax deed unless

the landowner offers to pay or repay or reimburse the holder of the tax certificate the amounts of the tax certificates and interest thereon.

As a matter of law and fact no such injunction was necessary nor did the court have any jurisdiction to grant it as all the appellee had to do was pay or redeem the outstanding tax certificates before the sale.

No 163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969.

163.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, As Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

C. ROBERT BURNS,
205 Worth Avenue,
Palm Beach, Florida,
Counsel for Appellee.

E. L. MESENBRINK, INC., 1108 Oak Street, Kansas City 6, Mo. HARRISON 1-0040

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, As Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

The appellee, HAROLD C. SAYLE, as Administrator of the Estate of Walter D. Sayle, Deceased, moves the Court to dismiss the appeal taken by the appellant, JOHN A. DUNSCOMBE, upon the following grounds:

1. *The appeal does not present any substantial federal questions.*

2. *The federal questions sought to be reviewed were not timely or properly raised or expressly passed on.*

3. *The judgments from which the appeal is taken rest on an adequate non-federal basis.*

ARGUMENT.

A mere glance at the questions presented by this appeal as set forth in the Notice of Appeal and in appellant's Jurisdictional Statement show they are completely devoid of any federal significance.

No federal questions were raised below and obviously none were passed upon since the judgment of the Supreme Court of Florida consisted of two words "Certiorari denied"[1] and the judgment of the District Court of Appeal consisted of two words "Appeal dismissed."[2]

The two judgments had to do solely with a question of state law with no federal significance of any kind.

Wherefore, the appellee respectfully moves that the appeal herein be dismissed.

C. ROBERT BURNS,
205 Worth Avenue,
Palm Beach, Florida,
Counsel for Appellee.

1. 119 So.2d 791.
2. 117 So.2d 250.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 1023

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS THE APPEAL.

JOHN WATTAWA,
1317 F Street, N. W.,
Washington 4, D. C.,
Attorney for Appellant.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo. HArrison 1-2030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 1023.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS THE APPEAL.

The brief of Appellee in support of his Motion to dismiss the Appeal fails to comply with the Court's Rules 16(b), 35(1), and 40, which would require the Motion and brief to point out why, as he asserts, the Appeal does not present a substantial Federal question, and to support his asserted grounds by citations of authorities.

It is not shown in the brief of Appellee in what respect a substantial Federal question is not raised, or that the Federal questions sought to be reviewed were not timely, or properly raised or expressly passed upon, or that the judgments on which the Appeal is taken rest on an adequate non-Federal basis.

Nor are authorities cited in Appellee's brief in support of his asserted grounds, from which it would follow that none such was available.

In *Kennedy* v. *McKee*, 142 U.S. 606, 611, 612, 12 S. Ct. Rep. 303, this Court said:

> "As no brief has been filed in behalf of the defendants in error, and as we are not informed by the record of the precise ground upon which the Court below proceeded, we will restrict our examination of the case to the single ground upon which the plaintiff in error questions the correctness of the judgment."

And in *I. T. S. Rubber Company* v. *Essex Rubber Company*, 272 U.S. 429, 431, 432, 47 S. Ct. Rep. 136:

> "In the brief for the I. T. S. Company, it is asserted, in general terms, that the action of the Essex Company in suits brought against its jobbers in the Sixth Circuit estops it from denying infringement here, and that the Circuit Court of Appeals erred in holding that it was not estopped by the decrees in such suits. The argument in the brief, however, specifies and deals with only one of such prior suits; *and there being no semblance of compliance with the requirement of Rule 25 of this Court, we will consider only the suit specifically relied upon.*" (Italics supplied).

As the movant herein cites no authorities in support of his asserted grounds; there is no question for the Court to consider.

Wherefore the Motion to dismiss the Appeal should be denied.

Respectfully submitted,

JOHN WATTAWA,
1317 F Street, N. W.,
Washington 4, D. C.,
Attorney for Appellant.

FILE COPY

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. ~~1028~~ 163.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

PETITION FOR REHEARING.

JOHN WATTAWA,
1317 F Street, N. W.,
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E. L. MENDENHALL, INC., 1106 Oak Street, Kansas City 6, Mo., HArrison 1-3080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 163

~~No. 1023.~~

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

PETITION FOR REHEARING.

The appellant is [redacted] aggrieved with the decision of this court dismissing his appeal on October 10th, 1960, and feels he either failed to make the errors complained of sufficiently clear or this court overlooked the following questions and therefore respectfully prays the court grant him a rehearing and vacate said judgment, grant the appellant a rehearing and pass on the questions raised, on the following several and separate grounds.

1. That the motion to dismiss the appeal in no way complied with the rules and should not have been granted.

2. That the contract of the appellant was impaired and destroyed and his federal constitutional rights under Article I, Section 10, violated by the procedure in the Florida Circuit Court.

3. That the appellant was deprived of his property and the right to enforce his contract without notice or due process of law and his property taken and given to the appellee without compensation in violation of his constitutional rights under the Fifth Amendment to the Federal Constitution, by the method of procedure of the Florida Circuit Court.

ARGUMENT.

1. That the motion to dismiss in no way complied with the rules and should not have been granted.

In support thereof the appellant cites the law and cases cited in his motion and brief objecting to said motion to dismiss the appeal as it failed to provide due process of law.

There were no reasons or grounds in the motion of the appellee as to why said appeal should be dismissed and in the absence of such grounds the appellant can't point out which of the unstated grounds were not applicable or invalid nor could the appellant rebut such unstated grounds and show why the appeal should not be dismissed.

2. That the contract of the appellant with the City of Stuart was impaired and destroyed and his federal constitutional rights under Article I, Sec. 10, violated by the procedure followed in the State Circuit Court.

Best v. *Turner*, 67 F.2d 786, 90 A.L.R. 1293, 2nd headnote.

"As the rig ts of the parties are dependent upon the Constitution and laws of Texas for a course of rule of property we accept the law of the state as construed by its highest court citing Warburton v. White. 176 U.S. 484; Chicago v. Risty, 276 U.S. 567, 48 S. Ct. 396."

State v. *Ivey*, 3 So.2d 345:

"The rights of the purchaser of a tax certificate are determined by the law in effect at the time of its acquisition."

State v. *Draughton*, 173 So. 352, 111 A.L.R. 345:

"A tax certificate is a contract between the authority that issues it and the purchaser and that right is protected by the constitutional guarantee of its impairment."

That unless the taxes are redeemed before the sale the holder is entitled to a tax deed.

12 Am. Jur. 67, Sec. 431, and cases cited as to what impairs a contract that the appellant had purchased from the City of Stuart for a valuable consideration, a final decree of tax foreclosure on the land in question after the court had determined that the taxes were valid and the amount due or the amount of money the land was liable for and was then substituted in the place of the City to enforce the final decree of foreclosure.

In *Fidelity Life Assoc.* v. *Martin County BPI*, 81 Fla. 2d 586, the school board had issued bonds to cover the cost to repair schools after a hurricane and the said bonds had been validated and sold after the validating decree. That later another court held similar bonds invalid and thereupon the School Board repudiated the validated bonds. While the trial court upheld that defense the Circuit Court of Appeals reversed and held:

"That if when the bonds were sold their validity had been determined by court decree their validity could not be affected by a later decision by some other court and cited Gulphe v. Dubuque, 1 Wall. 175; Douglass County v. Pike, 101 U.S. 677; Concordia Ins. Co. v. School Dist., 282 U.S. 545."

Beloit v. *Morgan*, 7 Wall. 206, 12th headnote:

"The judgment at law established conclusively the original validity of the securities described in the complaint and the liability of the town to pay them."

Los Angeles v. *Los Angeles Water Co.*, 177 U.S. 558:

"A contract authorized by the existing state constitution as then construed by the highest court of the State cannot be affected by a subsequent change of decision of that court."

In the instant case the final decree in the suit of the City conclusively established the validity of the taxes and the tax certificates based thereon and the amount the land described therein was liable for and that judgment is *res adjudicata* and has never been appealed or modified.

As stated in *State* v. *Draughton*, 173 So. 352, the purchaser of such certificates has a contract with the authority who issues it, that unless the taxes are paid or redeemed before the sale the tax certificate holder is entitled to a deed.

31 Fla. Jur. 265; *Coombes* v. *Wheeler*, 179 So. 785:

"In proceedings to foreclose municipal tax certificates the court has the power to fix the terms and conditions of the sale."

Nassau Realty Co. v. *Jacksonville*, 198 So. 581:

"Where the final decree of foreclosure of municipal tax certificates was entered in the Chancery Order

Book the fact that it was not recorded in the judgment and lien records does not render invalid subsequent proceedings for the sale of the land where the owner *failed to redeem.*"

Adams v. *Adams*, 180 So. 519:

"And such a final decree cannot be set aside except by appeal and is not subject to collateral attack."

3. That the appellant was deprived of his property and the right to enforce the final decree without notice or due process of law and his property taken and given to the appellee without compensation in violation of his constitutional rights under the Fifth Amendment by the method of procedure in the Florida Circuit Court.

The vital question on this appeal is whether the appellant can be deprived of his property right in the assigned final decree and right to enforce it without due process of law and in violation of his rights guaranteed under the Fifth Amendment and his property given to another without compensation.

Sec. 702.02 of Florida Statutes provides that the court can adopt the method of procedure to sell foreclosed property and direct the Clerk to advertise and sell said property after due advertisement and selling to the highest bidder. That upon such sale the Clerk issues the certificate of sale to the purchaser and then any interested party has 10 days within which to file objections to provide due process of law and avoid having the court confirm the sale. The Clerk proceeded to follow this order, advertised the land for sale, had the affidavit of publication at the sale and sold the land to the appellant and issued and delivered him the certificate of sale. When the ten day period had expired and no objections to the sale were filed the appellant asked for his certificate of title

and the Clerk then told him that the Court *had orally enjoined her* from issuing the certificate of title.

Florida Rule of Procedure 3.19 and which was adopted from the Federal Rule 65 forbids injunctions to issue without notice.

Florida Rule of Ethics for Judges IV—16:

> "Forbids ex parte applications for injunctions where the order may work a detriment to absent parties and only when the need of quick action is shown."

Rule 1.4 of procedure which was adopted from Federal Rule 5 requires that all pleadings and orders be filed in the court and cause.

But no motion or petition or order granting the injunction was ever filed to enjoin the Clerk from issuing the certificate of title or any notice of any such application and therefore the record shows the appellant was deprived of due process of law and by such proceeding his property was given to the appellee without compensation and appellant was deprived of his property right in the final decree that he had purchased and his right to enforce the same.

Sec. 702.02 provided the appellee with ample remedy if there were anything wrong with the sale as all he had to do was to file his objections, if any he had, and show why the sale was invalid but as he deducted these taxes from the purchase price he was estopped to deny their validity on any grounds.

Key West Wharf v. *Porter*, 58 So. 599, 1914A, Anno. Case 173:

> "One who purchases property subject to a lien and deducts the amount thereof from the purchase

price is estopped to question the validity of lien on any grounds."

12 Am. Jur. 247, Sec. 573, cites a large number of cases where this court has held such method of procedure does not afford due process of law.

Ochoa v. *Hernandez*, 230 U.S. 139, S. Ct. 33, page 1033:

> "Due process forbids taking one man's property and giving it to another, contrary to settled usages and *modes of procedure* and *without notice or opportunity of hearing.*"

Kenohah v. *Shaffer Oil Refining*, 38 F.2d 665, affirmed 48 F.2d 509:

> "One acquiring rights by administrative or judicial proceedings cannot be deprived of them *without notice and an opportunity to be heard.*"

There is no law or authority for the issuance of oral injunctions on *ex parte* applications without any notice nor did equity have any jurisdiction even if a motion or petition had been filed as the plain statutory remedy was ample by filing objections to the sale if there had been any grounds therefor.

But the effect of this unlawful method of procedure was to impair the judgment and render its enforcement impossible without due process of law and in fact give to the appellee the property of the appellant. But as the appellee could gain no benefit by such method of procedure and equity would consider that done which should have been done, this court should vacate said oral injunction and remand the case to the trial court with order

to the Clerk of said Court to issue and deliver the certificate of title to the appellant.

Respectfully submitted,

JOHN WATTAWA,
1317 F Street, N. W.,
Washington 4, D. C.,
Attorney for Appellant.

John Wattawa certifies that the foregoing petition for rehearing is filed in good faith and not for delay and that he mailed a copy thereof to Mr. C. R. Burns, 224 Worth Avenue, Palm Beach, Florida, on October ....., 1960.

.....,
JOHN WATTAWA.